

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KUMON NORTH AMERICA, INC.,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 07 C 7254
)	
STEPS TO SUCCESS, INC.)	JUDGE NORGLÉ
and PALI SHAH,)	MAGISTRATE JUDGE SCHENKIER
)	
Defendants.)	
)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION
TO COMPEL DISCOVERY, AND FOR RIGHT TO COMPLETE DISCOVERY AND
SUPPLEMENT PRE-TRIAL STATEMENT AND EXPERT REPORT

This case is scheduled for an expedited trial. Steps to Success, Inc. ("S2S") is interested in a trial of the case as soon as possible. However, discovery is important for S2S to battle Kumon's case based entirely on speculation and false assumptions. Thus far, it has been extremely difficult obtaining cooperation from Kumon and there has been nothing "expedited" about Kumon's discovery responses. S2S respectfully requests an order compelling Kumon to promptly respond to S2S' reasonable requests for additional discovery and to permit S2S to supplement its pretrial and expert submissions.

I. Delays In Discovery By Kumon

A. Written Discovery

Defendants served their Rule 26 Initial Disclosure and their Interrogatories and Requests for Production of Documents upon Kumon by hand on or about February 21, 2008. Defendants did not receive Kumon's Rule 26 Initial Disclosure until March 31, 2008. Kumon's Interrogatory Responses of March 24, 2007 were almost entirely evasive and non-responsive.

Exhibit A hereto. Moreover, Defendants did not receive Kumon's first production of documents until April 8, 2007, which was followed up with the production of additional documents on April 17, 2008 and April 29, 2008. Furthermore, as set forth below, there are extremely important documents that Kumon has not yet produced and that Kumon evidently will not produce voluntarily.

B. Depositions

Although Defendants sought to begin the depositions of Kumon's witnesses in late March and early April 2008, Kumon finally produced Robert Conran and their Rule 30(b)(6) witness on April 21 and 22, 2008. The transcripts from those depositions are not yet available. As set forth below, Defendants still seek the depositions of area manager Mino Tanabe, and Lisa Welch.

II. Current Discovery Still Sought

A. Files In Excel Format

Approximately 37 of the student enrollments that Kumon alleges that Steps to Success, Inc. misreported in September 2007 were admittedly misreported in Kumon's e-file system due to the problem with the system. The E-file program that Kumon provided to S2S generated Excel documents that S2S then submitted online to Kumon's K-2 enrollment reporting department. Due to an apparent glitch in the system, either the Excel document or Kumon's system of recording the Excel document misidentified S2S' September new enrollments as October new enrollments. When Kumon finally sent the correct data report for S2S' learning center for that time period, S2S identified the problem for Kumon and made the appropriate payments.

S2S has requested the original Excel files submitted by S2S to Kumon, yet Kumon continues to refuse to produce them. Obviously, those original files are extremely important.

S2S also seeks a copy in Excel format of the color Excel Spreadsheet prepared by Mr. Conran that Kumon used to base its decision to terminate the franchise agreement. A paper version of the document was used at the depositions, if the Excel version is necessary to blow up the documents for demonstrative purposes, as the paper version uses very small print. Kumon has failed and refused to produce this Excel document.

B. Original New Enrollment Applications

Also related to the September 2007 enrollment issue are the new enrollment application forms that S2S mailed directly to Kumon. The new enrollment applications are a three-page carbon copy document. The original front page, which is most legible, was mailed by S2S directly to the Kumon K-2 reporting department at the same time as S2S' E-File reporting. The second page is provided to the students' parents and the third page, which is the least legible, is retained by S2S. If Kumon's allegations that S2S intentionally misreported enrollment during this time were true, S2S certainly would not have written the September enrollment dates on the original new enrollment application forms that it mailed to Kumon. Kumon has also alleged that S2S made improper changes to the data on the enrollment forms, but those alleged changes look more like carbon copy smudges on S2S' copy, and the original enrollment application forms are necessary.

Obviously, these original new enrollment application forms that S2S mailed to Kumon are vitally important to S2S' defense. However, Kumon has failed and refused to produce these documents.

C. Enrollment Data from Other Learning Centers

S2S' independent investigation of Kumon's allegations of misreporting uncovered that several of the students that Kumon alleged were enrolled at the Hoffman Estates learning center were in fact enrolled at other learning centers during the time periods in question.

Kumon utilizes a comprehensive computer database system that allows Kumon to access enrollment information for all Kumon students throughout the country by name, date of birth and student ID#.

S2S has requested and Kumon has failed and refused to produce the enrollment records from the other learning centers at which the following students were enrolled before transferring to S2S' Hoffman Estates learning center:

Patel Kishan student Id # 0025010138

Saraf Anika Student ID # 0212002674 and #3843000306

Patel Shriya Student Id # 3601000341

Meehan Madelyn Id # 0092010643

Salwan Ambika Id # 0181001200

These documents are important not only to disprove Kumon's false allegations, but also to establish that Kumon intentionally or at least recklessly ignored data to which it had easy access.¹

¹ All of the documents sought should have been produced months ago in response to S2S' requests including the following document requests:

REQUEST NO. 5: Please produce all written communication and any other documents identifying each of the students that Kumon claimed were involved with S2S' alleged underreporting, failing to report, or misrepresenting of enrollment at the Learning Center.

D. Deposition of Mino Tanabe

Mino Tanabe is the Kumon area manager and a very important witness related to his efforts to terminate S2S. Counsel for the defendants were unable to depose him on the only date on which he was offered, April 29, 2008. S2S simply seeks permission to depose Mr. Tanabe, hopefully soon.

E. Deposition of Lisa Welch

Lisa Welch works in the K2 reporting department of Kumon and should have a substantial amount of information concerning S2S' efforts to accurately report enrollment. Information was obtained during the deposition of Mr. Conran on April 21, 2008 that requires exploration. Ms. Welch works in the Kentucky office of Kumon and Kumon will not make Ms. Welch available for deposition in Chicago. Ms. Welch is a full-time Kumon employee with extremely important information concerning this case. S2S respectfully requests an order requiring Ms. Welch to appear for deposition in Chicago during the next two week or on the day before trial, May 12, 2008.

III. Right to Supplement

As a result of Kumon's delays, S2S requests the right to supplement its pretrial submissions, including appropriate references to deposition testimony and to allow S2S' Fraud Examiner expert to review additional materials, including the deposition transcripts which are not yet available, in support of his opinions and, if appropriate, to amend his report.

REQUEST NO. 19: Please produce all documents concerning your contention or allegation that S2S underreported, failed to report, or misrepresented enrollment at the S2S Learning Center.

WHEREFORE, Steps to Success, Inc. respectfully request that the court ALLOW the Motion To Compel Discovery, And For Right To Complete Discovery And Supplement Pre-Trial Statement And Expert Report.

STEPS TO SUCCESS, INC.,
By its attorneys,

/s/ Rory A. Valas
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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 37.2

Defendants hereby certify that efforts were made including efforts through a telephonic conference on April 29, 2008 between Rory Valas, counsel for Defendants, and Danielle Keys, counsel for Kumon and e-mails including those on April 30 and May 1 to narrow the issues involved in this discovery dispute and such efforts were unsuccessful. Counsel has fulfilled the “meet and confer” requirements of the rules and the parties have been unable to reach agreement.

Signed under the penalties of perjury:

/s/ Rory A. Valas